

LIST
OF THE
ATTORNEYS-GENERAL AND SOLICITORS-GENERAL
OF
MASSACHUSETTS.
1686-1780.

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1895



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OF THE
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BY
ABNER CHENEY GOODELL, JR.

[REPRINTED FROM THE PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL
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ATTORNEYS-GENERAL AND SOLICITORS-GENERAL OF MASSACHUSETTS.

AT a meeting of the MASSACHUSETTS HISTORICAL SOCIETY, in Boston, on Thursday, June 13, 1895, Mr. A. C. GOODELL, Jr., made the following communication :

The following is an attempt to give a clear and succinct statement in chronological order of the several attorneys-general and solicitors-general of Massachusetts down to the time of the adoption of the Constitution of the Commonwealth. The subject is involved in so many intricacies that it is not surprising that the official list prepared and annually issued by the clerks of the Senate and House of Representatives is not only so incomplete as to be practically worthless, but is positively misleading.

The chief source of error in compiling these lists has been an imperfect understanding of the changes made in the manner of constituting these officers. Before the presidency of Dudley there had been no such officer as attorney-general in the colony. Under Dudley and his successor, Andros, the attorney-general was, of course, appointed, there being no assembly.

During the inter-charter period the office was continued, and was filled by election ; since, however, there is no record of more than one election during that period, it must be assumed that the official tenure of Attorney-General Checkley was during the pleasure of the General Court, or until the choice of a successor.

By the general proclamation for the continuance in place of persons in office, issued by Sir William Phips, the first governor under the province charter, Checkley remained in office according to his former holding, until October 28, 1692, when he received a commission from the Governor, with the advice and consent of the Council, to hold during the pleasure of the

crown.¹ This precedent was followed by Governor Dudley in 1702, in the appointment of his son Paul to this office.

In 1715, however, a report having gained credence that a new attorney-general, bearing a commission directly from the crown, was coming over to take the office, the House of Representatives raised the question of the right of the Governor and Council to appoint. Their claim was that the authority conferred upon the Assembly, by the charter, to name and settle, annually,² all civil officers excepting those whose election and constitution had been previously reserved, in the same instrument, to the crown, or to the Governor of the province, included the attorney-general. On the other hand, the practice which had prevailed from the beginning of the first administration was founded upon a previous clause in the charter granting and ordaining that it should be lawful for the Governor, by and with the advice and consent of the Council, to nominate and appoint, besides the judges and certain other enumerated officers, other officers "to our Council and Courts of Justice belonging." The received opinion was that the attorney-general was within this exception, — he being, as was alleged, an officer of the courts.

The Council, though at first disputing the claim of the Representatives, eventually conceded it, probably upon the strength of the support it received in the opinion of that eminent lawyer Sir Edward Northey, Attorney-General of England. The result of this controversy was the election of Paul Dudley, in 1716, and of his successors in office down to and including Joseph Hiller.

In 1729 the old dispute was renewed in the Legislature upon the authority of Sir Robert Raymond,³ son-in-law of Northey, and his successor in the office of attorney-general, who, jointly with the solicitor-general, Sir Philip York,⁴ officially gave an

¹ This, though not expressed in the commissions of the provincial judges, was the tenure by which they held, and not *quamdiu se bene gesserint*, as the commissions now run. See Life and Works of John Adams, III. 511 *et seq.* By the seventeenth article of Phips's instructions, he was required "to nominate a fit person for Attorney-General." The same instruction became the twenty-first of Bellomont's, the thirty-fifth of Dudley's, and the fortieth of Burges's and Shute's.

² Hence the term expired upon the election of a successor the next year, or, failing such election, upon the dissolution of the General Assembly convened next after the end of the political year in which the incumbent had been chosen.

³ Afterwards Lord Raymond.

⁴ Afterwards Lord Hardwicke.

opinion directly opposite to that expressed by Northey. This opinion was in a report to the Lords of Trade upon the memorial of Governor Shute, in which they certified that they were of opinion that the House of Representatives had made great encroachments on his Majesty's prerogative in joining in the election of the attorney-general, and had "assumed to themselves the exercise of powers neither warranted by this charter nor given them by law." It would seem that the fact that Sir Robert had given his opinion, with his reasons, at length, the year before, and that it had been thus reaffirmed and corroborated, was known to Lieutenant-Governor Dummer¹ in 1724; since, upon the election of John Read, that year, he submitted to the Council the question of the legality of the proceeding; and notwithstanding they advised that the election was in accordance with the charter, and though Read was pre-eminently fitted for the office, Dummer withheld his consent² to the election. In 1729, however, upon the question of proceeding to choose an attorney-general, the Council at first refused to join with the House. This refusal was repeated the next year; but in 1731, and thereafter, until 1749, both branches annually joined in the election,—the governor or lieutenant-governor for the time being withholding his consent, by excepting from the list of officers elected the person chosen attorney-general, and adding to the usual form of his certificate of approval a negative, concluding with the words, "there being an attorney-general already duly appointed."

In 1749 the Council determined to put an end to this farcical

¹ And see Sewall's Letter-Book, vol. ii. p. 164.

² From what I knew of the legislative practice, and the occasional slips and omissions of the Secretary, I had supposed that the Lieutenant-Governor's consent was actually given, though not expressly so stated in the record; but recently, with the efficient aid of our accomplished associate Rev. Dr. Slafter, I have been put in possession of facts which seem to show conclusively that Read was not in office this year. The most important fact is that he appeared this year in the Superior Court of Judicature, and moved in arrest of judgment for John Checkley, a person convicted upon indictment. The "attorney-general" had been specially charged to prosecute this case, and at that time Read held the office; but his term expired before the indictment was tried. A close examination and comparison of the records and files of the court, in which I had the intelligent assistance of Dr. Slafter, disclosed nothing that would throw a doubt upon the conclusion we arrived at, that it was owing to no peculiarity of our local practice, and was not in violation of his official obligations, that Read appeared for the defence, since the fact that his election had not been consented to left him free to choose his clients.

annual performance, by persisting in their refusal to join in the election of attorney-general. This led to a lively controversy, in which the whole dispute was reviewed, and discussed with great acuteness and ability. The result, however, was the abandonment, until the Revolution, of the election of attorney-general.

In 1775 the subject was again seriously and deliberately considered, and, after two years, a choice by the whole Assembly was decided to be conformable to the requirement of the charter; and this continued to be the rule until the power was revested in the Governor and Council by the ninth article of the first section of the second chapter of the Constitution.

The preceding sketch affords an explanation of the record in the legislative journals of numerous elections, seemingly regular, and yet conflicting with other entries of appointments by the executive. These apparent inconsistencies have led to many gross errors in the attempt to get at the real facts without exhaustive research.

In the case of the absence of the attorney-general, or of a vacancy in the office, the courts assumed authority to appoint an attorney for the crown, or for the State, *pro hinc vice*. Hence such names as George Farwell^x or Farewell, William Brattle, James Otis, Robert Auchmuty, etc., have improperly crept into the list of attorneys-general; and others, who at some time actually held the office, are not mentioned, or recorded as serving at times when they were not in office.

The commissions of oyer and terminer, as I have formerly¹ had occasion to show at considerable length, were not of that class of established judicatories which, by the charter, were to be created by the Legislature, and they were not tribunals in which the attorneys-general appeared by virtue of their office. An attorney was usually specially appointed to conduct proceedings for the crown in these courts. Such was the case in the court which tried the Salem witches, when Thomas Newton appeared for the crown while Checkley was attorney-general. Newton, however, was superseded by Checkley² after the latter had received a special commission to conduct those prosecutions.

¹ See the paper on "Witch Trials in Massachusetts," in Proc. Mass. Hist. Soc., vol. xx. p. 297 *et seq.*

² July 27, 1692.

J. G. F. said he had practised law in N. E. several years before 1686 - Felt's Annals v. II., p. 638 / Appendix 1.

By the following tables it appears that from 1686 to 1780 the office of attorney-general was filled seventeen times by election of the General Court (with the consent of the chief executive for the time being), and nine times during the same period the office was filled by executive appointment. The solicitors-general, as also the "special attorney-general,"—a solitary instance, and under a commission in force only about three months,—were appointed. The sum of the years of service of the appointed attorneys, however, exceeds that of those holding by election about fifty-five years. The years in which there was no attorney-general regularly constituted are 1721 and 1724, and from September, 1774, to June 12, 1777, besides other shorter periods between successive terms.

TABLE OF ATTORNEYS-GENERAL BEFORE THE CONSTITUTION.

CHOSEN.

APPOINTED.

Under the Presidency of Joseph Dudley :

BENJAMIN BULLIVANT

Date uncertain, but before
July 1, 1686; sworn in,
July 26.

Giles Masters, & frame indictment, arraign and prosecute. Apr 30 1687. G. M. King
JAMES GRAHAM

Under Sir Edmund Andros:

Date uncertain, but as early
as Aug. 25, 1687, he was
"settled in Boston and made
attorney-general."

James Graham appointed under Andros: 2^d Commission 20 June 1688 (3)

During the inter-charter period :

ANTHONY CHECKLEY

June 14, 1689

Under the Province Charter :

ANTHONY CHECKLEY

Oct. 28, 1692

PAUL DUDLEY

July 6, 1702

PAUL DUDLEY

June 8, 1716

PAUL DUDLEY

June 19, 1717

PAUL DUDLEY

June 25, 1718

Resigned Nov. 22, 1718.

JOHN VALENTINE

Nov. 22, 1718

JOHN VALENTINE

June 24, 1719

THOMAS NEWTON

June 19, 1720

Died May 28, 1721.

(Vacancy; John Read chosen, but negated by Governor Shute.)

JOHN OVERING

June 29, 1722

(1) Col. Rec. v. II., mB. Randolph Memoirs, II., p. 60, note.

(2) Sewall's Diary. For an account of his relations to Randolph, see Randolph Papers, passim.

(3) Mass. Archives, CXVIII., p. 271

	CHOSEN.	APPOINTED.
JOHN READ	June 20, 1723	
	(Vacancy; John Read chosen, but not consented to.)	
JOHN READ	June 28, 1725	
JOHN READ	June 21, 1726	
JOHN READ	June 28, 1727	
JOSEPH HILLER	June 19, 1728	
	(Addington Davenport, Jr., chosen June 12, but declined.)	
JOHN OVERING		June 26, 1729
EDMUND TROWBRIDGE		June 29, 1749
EDMUND TROWBRIDGE		May 14, 1762 ¹
	(Made Justice of the Superior Court of Judicature, March 25, 1767.)	
JEREMIAH GRIDLEY	^{10, barred 12th} (Died Sept. 7, 1767.)	March 25, 1767
JONATHAN SEWALL		Nov. 18, 1767
	(Vacancy from September, 1774, to June 12, 1777.) ²	

¹ Reappointment after demise of the Crown.

² Benjamin Kent was appointed for seven successive terms, beginning April term, 1776, by the Court of General Sessions of the Peace for Suffolk County, "to act as attorney-general" for the term. This covered a part of the term of Attorney-General Paine; and though Kent continued to be appointed until as late as January term, 1779, in the later appointments he is recorded as serving "in the absence of the Attorney-General."

By a resolve which is numbered CXXIII. in the printed resolves of the year 1777, thirty pounds were allowed to Kent, upon his petition for compensation "for his service as attorney-general for this State, from April 1776 to July 1777, inclusive." The date of this resolve is the eleventh of October, and on the fourteenth a warrant for paying to Kent the amount of this allowance was signed. In the House journals, under date of September 22, 1777, there is the minute of a vote referring a petition, similarly described, to a committee, consisting of Messrs. Gray, Mills, and Grout; and, under date of the tenth of October, there is a minute of the vote of acceptance of a report of the Committee "on the petition of Benjamin Kent, Esq^r," and of its being "sent up for Concurrence."

No petition precisely of the same purport as the above has been discovered; but an original petition signed by Kent, still remaining in the State Archives, and dated the eleventh of October, alleges "That on his late memorial for an allowance for his late service as attorney-general of sd State, in the County of Suffolk," from April, 1776, "to October, 1777, inclusively," the House determined that the County ought to pay him, but that many of the justices of the Court of Sessions apprehended "that, as the law and practice now is and has been," their allowance for any pay to the attorney-general "is unprecedented," and that they could not order it. The petitioner therefore prayed the Legislature to order and empower the Court of Sessions for Suffolk to allow him such compensation as to them should appear reasonable. On the same day this petition was "read, and committed to Mr. Niles, Captain Wales, and Mr. Greenleaf, who were directed to consider the matter at large." No formal report by this Committee has been discovered; but it is to be noticed that the printed resolve above referred to was passed the same day.

The inference from the record, therefore, is, that Kent sought compensation for services rendered as prosecuting attorney in Suffolk County during the period

(x) *Providence Church Records, and the New-Letter No 3337 of 17 Sept. 1767.*

	CHOSEN.	APPOINTED.
ROBERT TREAT PAINE	June 12, 1777	Accepted Aug. 26. ¹
ROBERT TREAT PAINE	June 19, 1778 (sworn)	
ROBERT TREAT PAINE	Feb. 5, 1779	
ROBERT TREAT PAINE	Jan. 4, 1780	

SPECIAL ATTORNEY-GENERAL,² ETC.

JONATHAN SEWALL March 25, 1767

SOLICITOR-GENERAL,³ ETC.

JONATHAN SEWALL June 24, 1767

(*Vacancy* from Nov. 18, 1767, to March 14, 1771.)

SAMUEL QUINCY ⁴ March 14, 1771

(A refugee, 1774–1775.)

named in his petition, and that the Legislature chose to reward him, by an allowance from the State treasury, for services rendered by him as "attorney-general," *pro hac vice*, during the period of the vacancy in that office, from the beginning of the State government to the date of Paine's acceptance of the office.

Soon after the passage of the above-named resolve a bill entitled "An Act to impower the Courts of General Sessions of the Peace in the several Counties in this State to appoint an Attorney-General," was introduced in the House, but was defeated, October 15, 1777, on a motion for a third reading.

¹ "To the honorable the Council & House of Representatives of the State of
Massachusetts Bay,—

GENTLEMEN, — I consider my self much honored by your appointment of me to the office of Attorney-General for this State.

I hope the importance of my political Engagements will be considered as an Excuse for my not giving an answer sooner.

I accept of the Office, and hope whilst I am in it I shall answer the reasonable expectations of my Constituents.

With the greatest Esteem I am

Yr obedient hble

Sert R T PAINE.

August 26, 1777."—*Mass. Archives*, vol. 198, p. 104.

² "... to be Special Attorney-General in all matters and causes whereto Jeremiah Gridley, Esq^r shall be prevented attending . . ."—*Executive Records of the Council*, vol. xvi. p. 212. This appointment was superseded upon his appointment as Solicitor-General.

3 " . . . to be Solicitor-General, Council at Law, and Special Attorney in all causes and cases to which the Attorney-General shall not attend, in as full a manner as the Attorney-General could act if he was present and acted therein . . ."—*Ibid.*, p. 235.

⁴ "Samuel Quincy Esq^r to be Solicitor-General, for the Province."—*Ibid.*, p. 536.

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